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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, GOVERNOR JAY
INSLEE, in his official capacity, et al.,

Appellants,

v.

FISHERIES, INC., a Washington corporation, and PAUL
TAPPEL, an individual and professional engineer,

Respondents.

BRIEF OF AMICI CURIAE WASHINGTON SOCIETY OF
PROFESSIONAL ENGINEERS,
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
AND AMERICAN COUNCIL OF ENGINEERING
COMPANIES

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend

WSBA No. 14355

Jonathan B. Collins

WSBA No. 48807

1619 8th Avenue North

Seattle, WA 98109

(206) 624-0974

Attorneys for Amici

WSPE, NSPE, and ACEC

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I. INTRODUCTION

The Washington Society of Professional Engineers, the National Society of Professional Engineers, and the American Council of Engineering Companies (collectively, amici) represent thousands of licensed professional engineers and strive to serve their members and the public by ensuring exemplary standards for qualifications among licensed professional engineers in addition to maintaining a dedication to the engineer Code of Ethics. The Legislature enacted Washington's professional engineer licensing statute to protect the public from dangerous, substandard work and deceptive practitioners, limiting those entitled to hold themselves out as members of the engineering profession to those with the requisite qualifications.

The trial court ruling here is consistent with the language and purpose underlying the statute, providing needed guidance to the State to fully enforce the Legislature's intent. By contrast, the State's determination

to allow unqualified individuals to hold themselves out as various kinds of “engineers” undermines that licensing regime, endangers the public, and denigrates the integrity of the profession. The Court should affirm.

II. IDENTITY AND INTEREST

Established in 1937, WSPE is a non-profit, voluntary professional association representing licensed professional engineers, licensed structural engineers, as well as engineer interns, graduate engineers, and engineering students. WSPE currently represents 220 members across Washington state.

WSPE is an integrated state chapter of the National Society of Professional Engineers (NSPE), which represents more than 35,000 engineers nationwide. Founded in 1934, NSPE’s mission is to further the interests of licensed professional engineers, regardless of practice area, protect engineers (and the public) from unqualified practitioners, build public recognition for the profession,

and stand against unethical practices. WSPE and NSPE have as their core values maintaining an exemplary standard for ethics and accountability by prioritizing “public health, safety and welfare above all other considerations” and ensuring “authoritative expertise” in professional standards, qualifications, and licensure. *NSPE: Who We Are and What We Do*, Nat. Soc’y of Pro. Eng’rs, available at: <https://bit.ly/3aVzm9v> (last visited June 17, 2022).

In Washington, WSPE promotes the public welfare by providing guidance and testimony before legislative committees and governmental rule-making agencies on an array of important issues including construction, environmental regulation, professional licensing, public health, and transportation. *See generally, About WSPE*, Wash. Soc’y of Pro. Eng’rs, available at: <https://bit.ly/3aVsx7W> (last visited June 17, 2022).

Founded over a century ago, the American Council of Engineering Companies (ACEC) is a federation of 52 state and regional councils representing engineering firms comprising more than 600,000 engineers, architects, land surveyors, and other specialists. ACEC serves its members by providing educational and business resources in addition to strengthening the engineering industry via advocacy and political action. *About ACEC*, ACEC, available at: <https://bit.ly/2o39xZ3> (last visited June 17, 2022).

WSPE, NSPE, and ACEC all have a particular interest in furthering the purposes of Washington's professional engineer licensing statute, RCW ch. 18.43, and encouraging the State's interpretation of that statute in a manner that preserves the integrity of the Legislature's carefully drawn licensing scheme. In particular, WSPE and NSPE seek to protect their licensed engineer members and the public welfare through consistent application of state

engineering license requirements for all individuals practicing regulated disciplines and for companies or state agencies holding their employees out as professional engineers irrespective of their qualifications or licensing status.

Accordingly, while the State's appeal raises several issues, including standing, immunity, and appropriate relief under the Administrative Procedure Act and the Uniform Declaratory Judgment Act, amici address only the proper interpretation of the Professional Engineers' Registration Act, RCW ch. 18.43, and the Act's restrictions on the use of the job title "Engineer."

III. STATEMENT OF THE CASE

Respondent Paul Tappel, a licensed professional engineer, filed a complaint with the Board of Registration for Professional Engineers and Land Surveyors objecting to the use of the title "Forest Practices Engineer" by an unlicensed employee of the Washington Department of

Natural Resources, who was engaged in engineering and design of roads, bridges, and culverts. (CP 254-56) Consistent with its position in rejecting complaints that other state agencies hold their unlicensed employees out with job titles containing the term “Engineer,” the Board found no violation of the licensing statute or its rules.

As a result of the Board’s misapplication of licensing regulations, there are over 800 employees at multiple state agencies with professional engineering job titles, such as “Bridge Engineer,” “Civil Engineer,” “Environmental Engineer,” and “Transportation Engineer.” (Resp. Br. 21-22) None of these job titles require professional engineering licenses even though the relevant job descriptions indicate professional level engineering work.

Mr. Tappel and his firm respondent Fisheries Engineers, Inc., sought injunctive and declaratory relief challenging the Board’s and the Attorney General’s, acting as the Board’s legal advisor, refusal to enforce the licensing

statute. (CP 9-28) The Thurston County Superior Court granted the requested relief, enjoining the State from bestowing upon its unlicensed employees the professional job title and description of “Engineer.” (CP 761-62)

Amici adopt the Statement of the Case in the Brief of Respondents Fisheries Engineers, Inc. and Paul Tappel.

IV. ARGUMENT

A. Washington’s Professional Engineers’ Registration Act imposes rigorous qualification and ethical standards to protect the public from incompetent and fraudulent practitioners.

Every professional licensing regime serves the public interest in two related ways: by ensuring members of the profession exhibit an acceptable level of competence and expertise, and by excluding unqualified individuals who might misrepresent their skills and abilities to take advantage of the unsuspecting public. Licensing regimes are particularly necessary for highly-skilled professional occupations—like medicine, law, and engineering—

because these professions require “substantial intellectual training [such that] clients cannot adequately evaluate the quality of the service.” Elizabeth J. Hubertz, *Public Interest, Professional Bargains: Ethical Conflicts Between Lawyers and Professional Engineers*, 31 Wash. U. J.L. & Pol’y 83, 88 (2009) (quoted source omitted).

The United States Supreme Court recognized long ago that professional licensing is necessary “to provide for the general welfare” by ensuring that practitioners demonstrate “a certain degree of skill and learning upon which the community may confidently rely,” thus protecting against “the consequences of ignorance and incapacity, as well as of deception and fraud.” *Dent v. State of W. Va.*, 129 U.S. 114, 122, 9 S. Ct. 231, 32 L. Ed. 623 (1889).

Modern professional engineering license statutes are a direct result of the harsh consequences that arose when the practice of engineering was unregulated. Many states

passed licensing statutes in the early 20th century only after decades of hard-fought political victories against opposition from laissez-faire industrialists and leaders in engineering societies who feared they would not meet licensing requirements. See Paul M. Spinden, *The Enigma of Engineering's Industrial Exemption to Licensure: The Exception that Swallowed a Profession*, 83 UMKC L. Rev. 637, 649-53 (2015). During this period, two national tragedies also spurred legislatures to action: in 1928, a poorly-designed dam near Los Angeles collapsed, killing over 500 people; and in 1937, a flawed gas distribution system caused an explosion at a school in Texas, killing 300 children and their teachers. Spinden, *supra*, 83 UMKC L. Rev. at 662-63. By 1947, every state had adopted some

form of professional engineering statute. Spinden, *supra*, 83 UMKC L. Rev. at 662.¹

Like other states, Washington recognized that unregulated engineers presented a unique danger to the public, and enacted its licensing Act in 1935. Laws of 1935, ch. 167, §§1-17. When the Legislature amended the Act in 1947, it emphasized the licensing statute was necessary “to safeguard life, health, and property, and to promote the public welfare,” further providing that “it shall be unlawful for any person” to practice engineering without a license or mislead the public by “convey[ing] the impression that he or she is a professional engineer.” RCW 18.43.010. The Legislature expressly equated the titles “engineer” and

¹ NSPE was founded in part to advocate for professional licensing statutes, as reformers recognized licensing was “necessary for the safety of the public” and “also for the protection of the good name of the profession.” Doug McGuirt, *The Professional Engineering Century*, The Magazine for Professional Engineers (June 2007), available at: <https://bit.ly/3xLH7Ih> (last visited June 17, 2022).

“professional engineer” in its licensing statute. RCW 18.43.020(3) (“Engineer’ means a professional engineer as defined in this section.”).

Washington’s professional engineering licensing regime does more than prohibit individuals from expressly holding themselves out as professional engineers. The Legislature expressly prohibits unlicensed individuals from even *implying*, “through the use of some other title,” that they have a license to perform “any engineering service”:

A person shall be construed to practice or offer to practice engineering . . . who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself or herself to be a professional engineer, or *through the use of some other title implies* that he or she is a professional engineer; or who holds himself or herself out as able to perform . . . any engineering service or work or any other professional service designated by the practitioner or recognized by educational authorities as engineering.

RCW 18.43.020(8)(b) (emphasis added).

The Act provides that “it shall be unlawful for any person . . . to use in connection with his or her name or otherwise assume, use, or advertise any title or description tending to convey the impression that he or she is a professional engineer . . . unless such a person has been duly registered under the provisions of this chapter.” RCW 18.43.010. It further broadly defined the “practice of engineering” to include compliance with specifications and design in any public or private projects:

“Practice of engineering” means any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects.

RCW 18.43.020(8)(a).

The Legislature created the Board of Registration for Professional Engineers and Land Surveyors to enforce and administer the licensing statute. RCW 18.43.030. It further provided for criminal sanctions for the unlicensed practice of engineering. RCW 18.43.120 (“Any person who shall practice . . . engineering in this state . . . without being registered in accordance with the provisions of this chapter . . . shall be guilty of a gross misdemeanor.”).

The Legislature imposed minimum standards for registration as a licensed professional engineer, including eight years of experience (which can include completion of an approved engineering curriculum program) as well as the successful completion of required Board examinations. RCW 18.43.040(1)(a). The Board has imposed specific requirements that a professional engineer:

- (1) Have eight years of experience in engineering work of a character satisfactory to the board:
 - (a) The eight years of experience may be a combination of education and practical work

experience. Under selected circumstances a maximum of five years of education (baccalaureate and master's degrees in engineering) can be granted toward the eight-year requirement;

(b) The eight years of experience must be broad based, progressive experience to include gaining knowledge and comprehension of engineering subjects and applying engineering principles.

(2) Receive a passing score on the National Council of Examiners for Engineering and Surveying (NCEES) fundamentals-of-engineering (FE) examination. Or, have a current license as a Canadian professional engineer (P.Eng), and having received a passing score on the Engineers Canada Professional Practice Examination (PPE);

(3) Receive a passing score on the NCEES principles and practice of engineering (PE) examination;

(4) Receive a passing score on the Washington law review;

(5) Be of good character and reputation; and

(6) Payment of applicable fees.

Exam results must be independently verified by the NCEES member board, or engineers Canada constituent association that granted approval to take the exam.

WAC 196-12-010.

B. The State's practice of allowing unqualified individuals to use the title "Engineer" undermines the integrity of the licensing regime, delegitimizing the profession and endangering the public interest.

The record supports the trial court's determination that the Board has refused to heed the Act's unequivocal language prohibiting unlicensed individuals from using the title of "Engineer" while performing work that meets the broad statutory definition of the practice of engineering. (Resp. Br. 15-23, 49-59) The Board's refusal to require State agencies to follow the statutory mandate disrupts the integrity of the licensing regime altogether, harming the public interest and undermining the reputation and standing of the profession and the individuals who have adhered to the rigorous standards imposed by the Legislature.

For one, creative "engineer" job titles, such as "Bridge Engineer," "Civil Engineer," and "Environmental Engineer," confuse professional engineers with unlicensed

technicians lacking the rigorous professional standards that the Legislature intended all engineers performing engineering services must have to protect the public interest. This situation can result in dramatically different quality in work product because, for example, an “engineer having earned a graduate degree may occupy a cubicle next to a person who, although titled ‘engineer,’ has not attained even a bachelor’s degree” or otherwise obtained basic license requirements. Spinden, *supra*, 83 UMKC L. Rev. at 679.

To be sure, the professional engineers who make up membership of WSPE and NSPE have a substantial interest in maintaining the integrity of their professional qualifications, in which they have invested years of hard work and many thousands of dollars in education and training. But amici’s interest in maintaining the professional reputations of their members is not the sole basis for insisting that those who lack these rigorous

standards do not usurp the title of “Engineer”. Allowing non-professionals to hold themselves out as engineers poses a significant threat to public health and safety, undermining the Legislative’s clear intent that the work of professional engineers adhere to minimum standards and technical competence obtained through significant education and practical experience and as evidenced by successful completion of a rigorous examination.

These concerns become even more acute when the confusion arises in job titles for public employees, such as in the instant case. Public confidence in government continues to decline.² In Washington state, large capital projects are often delayed, over budget or subject to costly

² <https://pewrsr.ch/3QioJxY>

While state and local government gets higher marks, public trust in state government continues a 20-year decline. <https://bit.ly/3zCM8Em>

repairs.³ The Legislature has passed a 16-year, \$17 billion infrastructure bill to be executed and administered by public agencies. See Rachel La Corte, *Washington Governor Signs \$17 Billion Transportation Package*, Seattle Times, March 25, 2022, available at: <https://bit.ly/3tDhKGb> (last visited June 17, 2022). The public has a substantial interest in ensuring that design, construction and administration of these projects be performed competently, by individuals who are professionally trained and licensed under the Board's rigorous standards as Professional Engineers.

The public interest goes beyond ensuring minimum standards of competence. Professional engineers owe ethical duties to the public that the unlicensed “engineers”

³ Examples include the Highway 99 tunnel, the West Seattle bridge and Sound Transit. See, e.g., Jessica Lee, *How Did We Get Here? A Look Back on Seattle's Tunnel Machine Bertha*, Seattle Times, March 10, 2017, available at: <https://bit.ly/3HzxgZj> (last visited June 17, 2022).

do not. Professional engineers are personally responsible for their services and must comply with a professional code of ethics, which includes several “obligation[s] to the public,” including: “to be honest, fair, and timely in their dealings with the public”; to “be able to demonstrate that their final documents and work products conform to accepted standards”; to “inform their clients or employers of the harm that may come to the life, health, property and welfare of the public at such time as their professional judgment is overruled or disregarded”; to “be objective and truthful in professional documents, reports, public and private statements and testimony” and “not knowingly falsify, misrepresent or conceal a material fact in offering or providing services to a client or employer”; and to “offer their services in a truthful, objective, professional manner that effects integrity and fosters public trust in the engineering and land surveying professions.” WAC 196-27A-020(1)(a)-(j).

Professional engineers may face discipline for violating the code of ethics or committing other misconduct, with penalties ranging from a reprimand, to suspension or revocation of a license, to a fine, and even being charged with a misdemeanor. RCW 18.235.110, .130; RCW 18.43.105.

The law imposes ethical obligations on professional engineers for the same reason it imposes ethical rules on attorneys—their work implicates the public interest and is sufficiently complex that a layperson is unlikely to have the expertise to evaluate its quality. Permitting unlicensed individuals to hold themselves out as “engineers”—with no comparable ethical obligations—diminishes the profession and further endangers the public.

Finally, even if unlicensed public servants, such as DNR’s “Forest Practices Engineer,” are not performing tasks that would otherwise amount to engaging in the “practice of engineering” as defined under RCW 18.43, the

statute makes clear that simply implying, conveying, or holding oneself out as an engineer without a license is sufficient to violate the statute. RCW 18.43.010, .020(8)(b). Thus, the misuse of the “engineer” title causes confusion that is harmful to both the engineering profession and the public.⁴ Because the statutory scheme uses “engineer” and “professional engineer” interchangeably, creative job titles like those at issue here will proliferate and further confuse the public—there will be so many iterations of the term “engineer” that no one will know who is licensed and who is not.

⁴ The State cites the statutory exemption allowing an unlicensed individual to engage in acts that may fall within the “practice of engineering” under the supervision of a licensed professional engineer. RCW 18.43.130(4) (App. Br. 53) But that exemption does not authorize the misleading use of the professional engineer title.

C. The trial court’s ruling is consistent with other jurisdictions and with Washington courts’ treatment of other licensed professions.

Licensing statutes for professional engineers and similar occupations “fall into two broad categories: (1) those that prohibit persons from holding themselves out as an . . . engineer when they are not licensed as such; and (2) those statutes that prohibit practicing . . . engineering without a license.” 5 *Bruner & O’Connor on Construction Law* § 16:5 (2021). In most jurisdictions, “courts have interpreted ‘holding out’ statutes quite broadly as being equivalent to licensing statutes” and thus “the distinction between ‘holding out’ and ‘practice’ statutes now is largely historical.” 5 *Bruner & O’Connor on Construction Law* § 16:5.

Washington’s statute is the broadest form of a licensing statute because it contains a prohibition against both the unlicensed “practice” of engineering and the “holding out” as an engineer. RCW 18.43.020(8)(b).

Although Washington courts have not squarely addressed this issue, the trial court ruling here is consistent with our courts' broad interpretation of other licensing statutes to further the Legislature's purpose of protecting the public from unprofessional practice. *See, e.g., State v. Pacific Health Ctr., Inc.*, 135 Wn. App. 149, 165-66, ¶¶19-20, 143 P.3d 618 (2006) (holistic treatment provider engaged in the "practice of medicine" by making representations that "they can help [customers] feel better," even if the "terminology [in representations] may differ from that of mainstream western medicine."); *Wash. State Bar Ass'n v. Great Wn. Union Fed. Sav. and Loan Ass'n*, 91 Wn.2d 48, 54, 586 P.2d 870 (1978) (adopting broad definition for the "practice of law" because it "does not lend itself easily to a precise definition.").⁵

⁵ The practice of law is now defined under GR 24.

States employing statutes similar to Washington's also adopt an expansive definition to fulfill the public purpose underlying the licensing regime.⁶ The trial court's

⁶ See *Snodgrass v. Immler*, 232 Md. 416, 194 A.2d 103, 105 (1963) (Although plaintiff did not specifically “hold himself out . . . as a registered architect,” he nevertheless held himself out as an architect for purposes of the statute by contracting to perform “planning and designing” of a house, “including aesthetic and structural design.”); *Rodgers v. Kelley*, 128 Vt. 146, 259 A.2d 784, 787 (1969) (“Thus, the position of the plaintiff is that, so long as he dutifully did not label himself, or his plans, or his business with the title of ‘architect’ or ‘registered architect,’ he is not operating in violation of the requirements of the statute in any way. But ‘holding oneself out as’ an architect does not limit itself to avoiding the use of the label.”); *McWhorter v. State Bd. of Reg. for Pro. Eng’rs and Surv.*, 359 So.2d 769, 772 (Ala. 1978) (rejecting plaintiff’s argument that “the mere inclusion of the term ‘engineering’ in a business name does not connote the professional status” because, “[b]y enacting these statutes, the Legislature was seeking to protect the public from both active and unintentional misrepresentations which could cause harm to public health, safety and property.”); *Bonnieview Homeowners Ass’n, LLC v. Woodmont Builders, LLC*, No. Civ.A. 03CV4317 (DRD), 2005 WL 2469665 (D.N.J. Oct. 6, 2005) (“Although the statute defining engineering work does not specifically include environmental engineering . . . this is certainly not excluded from the purview of the statute.”) (unpublished, cited per GR 14.1); (see also Resp. Br. 53-55, 68-69, citing *Van Breemen v. Dep’t of Pro. Regul.*, 296 Ill. App. 3d (1998)).

ruling was consistent with Washington’s statutory scheme and other jurisdictions applying similar statutes.

V. CONCLUSION

The State Board of Registration for Professional Engineers and Land Surveyors abdicated its authority to enforce the Legislature’s licensing regime for professional engineers and, in doing so, severely undermined the public protection that regime ensured. The Court should affirm the trial court’s carefully reasoned order that adheres to the Legislature’s intent to protect the public from the unauthorized practice of professional engineering through the use of the title “Engineer” by unlicensed individuals.

*I certify that this brief is in 14-point Georgia font
and contains 3,592 words, in compliance with the Rules of
Appellate Procedure. RAP 18.17(b).*

Dated this 17th day of June, 2022.

SMITH GOODFRIEND, P.S.

By: /s/ Howard M. Goodfriend

Howard M. Goodfriend

WSBA No. 14355

Jonathan B. Collins

WSBA No. 48807

Attorneys for Amici

WSPE, NSPE, and ACEC

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 17, 2022, I arranged for service of the foregoing Brief of Amici Curiae Washington Society of Professional Engineers, National Society of Professional Engineers, and American Council of Engineering Companies, to the court and to the parties to this action as follows:

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Alan D. Schuchman Rochelle Y. Doyea Cairncross & Hempelmann P.S. 524 Second Avenue, Suite 500 Seattle, WA 98104 aschuchman@cairncross.com RDoyea@cairncross.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

Leah E. Harris Jonathan E. Pitel Assistant Attorney General Washington Attorney General's Office 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 Leah.Harris@atg.wa.gov jonathan.pitel@atg.wa.gov	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
--	--

DATED at Seattle, Washington this 17th day of
June, 2022.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

SMITH GOODFRIEND, PS

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